

**U.S. Department of Labor**

Office of Administrative Law Judges  
Washington, DC



In the Matter of

Case No. 80-ESA-2

GOVERNMENT OF GUAM

Frederick J. Horecky, Esquire  
For the Guam Department of Labor

Norman Nayfach, Esquire  
For the United States Department of Labor

Before: ROBERT G. MAHONY  
Administrative Law Judge

**DECISION AND ORDER**

Preliminary Statement

This proceeding arises under the Wagner-Peyser Act of 1933, as amended, 29 U.S.C. 49 et seq. (hereinafter referred to as "the Act") and the regulations issued pursuant thereto governing the Employment Service System. 20 C.F.R. §658 et seq. This case arises from a determination by the Grant Officer of the United States Department of Labor (USDOL) that the Guam Department of Labor (GDOL) incurred \$22,905.46 of unallowed costs by paying excessive rents for space in the Joseph Flores Building in Agana, Guam for a five year period beginning September 1, 1972. The grants involved were Employment Service (ES) grant No. 09-78-L-204 and Work Incentive Program (WIN) grant No. 4438-66.

A hearing was held on October 23, 1980 in Agana, Guam. After delay in receipt of the transcript, brief on August 10, 1981. GDOL filed its post hearing USDOL filed its post hearing brief on October 27, 1981.

Motion To Amend

On October 7, 1980, USDOL filed a Motion to Amend Grant Officer's Final Determination and Dismiss WIN Appeal. USDOL wishes to amend the Grant Officer's October 25, 1979 final determination to clarify that the offer to GDOL of an opportunity for a hearing applies only to excessive rental findings concerning the ES grant, not the WIN grant. USDOL moves to dismiss GDOL's appeal concerning the WIN disallowance portion of the Grant Officer's determination based on a lack of jurisdiction of the Office of Administrative Law

Judges under 20 C.F.R. 658. GDOL filed an opposition to these motions on the grounds that USDOL is attempting to revoke the WIN appeal rights already granted GDOL by the Grant Officer. Ruling on these motions was reserved pending completion of the hearing.

In his determination, the Grant Officer found that \$22,905.46 of GDOL's ES and WIN grants were unallowable costs, and requested that this amount be repaid to USDOL. The Grant Officer further stated:

If you disagree with the determination made, you may request a hearing pursuant to Section 658.703(a), 658.706(c), and 658.707 of the ES Regulations.

The above-mentioned sections provide that, where a State agency has violated ES funding regulations, the Regional Administrator (Grant Officer) shall issue a written disallowance of the expenditures and must offer the State agency the opportunity to request a hearing before an Administrative Law Judge. These provisions, however, apply only to a request for a hearing after a disallowance of expenditures under ES. Funds provided under WIN are totally separate from funds provided under the ES program. The Grant Officer's offer of a hearing on the issue of the disallowance of expenditure of WIN funds is not authorized by this section, nor does his attempt to permit a WIN appeal confer subject matter jurisdiction on this office in such a proceeding.

WHEREFORE, USDOL's Motion To Amend Grant Officer's Final Determination is GRANTED and GDOL's appeal of the disallowance of expenditures under WIN is dismissed without prejudice. Accordingly, this decision concerns only the ES grant and the disallowance of \$10,020.87 thereunder.

#### Findings of Fact

Based upon the stipulations of the parties and the evidence adduced at the hearing, I make the following findings of fact:

GDOL is the recipient of funds granted pursuant to the Wagner-Peyser Act of 1933, as amended, 29 U.S.C. 49 et seq. The grant in question was intended for the operation of an employment service program as part of the federal-state employment service system.

Prior to September of 1972, the various agencies of GDOL were located in three different buildings. In August of 1972, GDOL published an invitation to bid for new office space to house all of GDOL. Specifically, a five year lease for air conditioned office space of approximately 11,967 square feet, located in central Agana, preferably within the vicinity of the Government of Guam administration building. The only formal bid received was that of Mr. Joseph Flores offering to lease the unoccupied three-story Flores Building at a rent of \$8,000/month, or approximately 67 cents per square foot.

In September of 1972, GDOL executed a written lease agreement with Joseph Flores for a five year term from September 1, 1972, through August 31, 1977. The rented premises consisted

of a newly-constructed three story building (hereafter referred to as the Flores Building) located immediately adjacent to the Guam Savings and Loan Building in downtown Agana, Guam. The total space available to GDOL under the lease was 11,967 square feet. The monthly rental included building maintenance, air conditioning and certain other fixed equipment inside and outside the building, but did not include utilities (water, power and telephone) nor janitorial services, supplies, or the cost of partitioning and otherwise putting the facilities into condition for use by the GDOL. The lease was cancellable by its terms on 60 days notice in writing to the lessor. Rental payments were made pursuant to the lease from September 1, 1972 to August 31, 1977. During that period, rental charges allocated to the ES program totaled \$30,366.26, not including installation, janitorial, and utility costs. In 1977, the GDOL moved into the Duenas building<sup>1</sup> in Maite for a rental of 30 cents per square foot.

In March of 1978, the USDOL Directorate of Audit and Investigations released its audit report of the Government of Guam Employment Security Agency, Report No. 09-78-L-204. The report contained findings that the Flores Building space rental costs were excessive.

On October 25, 1979, the Grant Officer issued his final determination disallowing Employment Service program rental costs for the period September 1, 1972 through September 30, 1977 in the total amount of \$10,020.87. GDOL requested a hearing before the Office of Administrative Law Judges pursuant to 20 C.F.R. 658 et seq.

#### Issues

1. Was the rent paid by GDOL on the Flores Building excessive?
  - (a) If so, is GDOL entitled to an offset for \$6,400.00 spent on the ES program for which it did not receive Federal reimbursement?

#### Burden of Proof

20 C.F.R. 658.709(a) provides that a hearing in an ES case shall be conducted in accordance with Sections 5-8 of the Administrative Procedure Act, 5 U.S.C. 553 et seq. §556(d) provides that "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof." The identity of the "proponent" of the rule or order is not always easily established in an adjudicatory proceeding. The procedural context of this particular type of proceeding must be examined to fairly allocate the burden of proof. "... where the burden of proof will fall, to a great extent, depends on the agency involved, the nature of the statute, or provision thereof, enforce, which the agency seeks to and the attitude of the courts." 4 Mezines, Stein, Gruff, Administrative Law §234.02 at 24-26 (1981).

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<sup>1</sup> The "Duenas" building to which the GDOL moved in 1977 was located in Maite and was officially known as the Janet Commercial Building. See footnote 4.

In the present case, the U.S. Department of Labor conducted an audit of GDOL which resulted in a unilateral finding of non-compliance with the ES regulations. Under the ES regulations, GDOL was then placed in the position of filing a request for hearing before the Office of Administrative Law Judges. Although normally the person requesting the hearing has the burden of proof, the actual positions of the parties may indicate that the burden is properly placed elsewhere. Given the circumstances of this type of proceeding, GDOL's mere request for a hearing does not confer procedural rights and obligations. The Administrative Law Judge hearing is not in the nature of an appeal proceeding, but is equivalent to a trial level or fact-finding hearing.

USDOL is the author of ES regulations which affect GDOL. In addition, USDOL cannot recover what it has determined to be "disallowed funds" unless it receives a favorable finding by the Administrative Law Judge. These two facts considered together would make it logical to identify USDOL as proponent of the rule or order being sought. Therefore, I conclude that the burden of proof rests with the USDOL to prove that the disallowed costs were excessive.

#### Rental Cost

The USDOL argues that a rental cost of \$.67 per square foot for space in the Flores Building in 1972 represented an unreasonable expenditure of funds in light of the existing market prices and that \$10,020.87 of such costs should be disallowed.<sup>2</sup> GDOL alleges that such a finding on the part of the Grant Officer was arbitrary and capricious and that there was sufficient justification for the rental cost.

The USDOL presented the testimony of Mr. Ricardo Salas, General Manager and President of the Salas Agency Corporation. Mr. Salas had been in the business of real estate development since 1966. 1966 was also the last year he was licensed as an appraiser.<sup>3</sup> Mr. Salas

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<sup>2</sup> In its memorandum, USDOL does not take the position that the bidding procedures under the ES regulations were violated by GDOL, but rather, questions whether the procedure used by GDOL was reasonable in light of the regulations lowest possible cost to GDOL. purpose to obtain space at the USDOL contends that GDOL's invitation for bids contained an overly specific description of the desired property which unduly restricted competition and thereby created the real possibility of an unreasonable rate. It is in this context that evidence concerning the bidding procedures will be considered..

<sup>3</sup> In 1972 Mr. Salas was a senator in the Guam legislature and was vice chairman of the committee on finance which reviewed the budget requests of all executive and legislative departments for their yearly operations. In this capacity, he had the opportunity to personally review the appropriateness of the rent paid on the Flores building by the GDOL. Having previously reviewed the rent on other buildings at 30-50 cents per square foot, and seeing that the rent on the Ada Arcade next door was 45 per cents square foot, he had his staff check as to why the Flores Building was 67 cents per square foot. Mr. Salas found that the Flores building had approximately 11,500 to 12,000 available square feet, and cost \$200,000. He questioned the

testified that from 1966 to 1972 he rented space in the Judge Duenas building, one and one-half blocks from the Flores building, at 35 cents per square foot from Judge Duenas, a family friend.<sup>4</sup> In 1972, Mr. Salas personally increased his own rent to 40 cents per square foot. In 1977, he increased it to 50 cents per square foot. Mr. Salas also testified that the Charlie Corn building in the same block as the Duenas building, rented for 50 cents per square foot in 1972. In 1972, he was instrumental in renting the Pete Perez building to various companies for 1972 and 1973. They began renting at 45 cents. The return on investment he advised was 10%, 15% maximum.

In comparing the Judge Duenas and the Flores buildings, Mr. Salas testified that the Flores building was completed in 1973 and had total concrete block construction and central air conditioning. The Duenas building, completed in 1966, was of semi-concrete construction and had only two window air conditioners.

Ms. Mimi Yut Wah Lee also testified on behalf of the USDOL. From 1972 to 1979, Ms. Lee was an auditor for USDOL. In June of 1977, she conducted a compliance and financial audit of the Government of Guam, specifically the ES and WIN programs. Her investigation began with an opening conference with Mr. Lloyd Umagat, the Director of GDOL, and various other officials of GDOL. In addition, Ms. Lee had the opportunity to look at the lease on the Flores building, the bid documents, and to review the report of the Department of the Interior Comptroller's Office. She did not, however, speak to anyone who had actually negotiated the lease. The Comptroller's report found that the bidding process used in obtaining the Flores building was improper and that 67 cents per square foot rental was excessive. Ms. Lee did not feel, however, that this report was sufficiently detailed, and conducted an additional investigation.

Her investigation revealed that an informal preliminary bid invitation received response from two bidders, Mr. Joseph Flores and Mr. Peter Ada. But the Supply Management Division which handles the bidding process had a record of receiving a formal bid only from Mr. Flores. Ms. Lee testified that although bids were solicited from more than one individual and no one was prevented from submitting a bid, the bid solicitation actually described the exact location and footage of the Flores Building, thus effectively discouraging other bidders.

The Comptroller's office suggested that Ms. Lee speak to the Salas Corporation, a local real estate agency, concerning rental prices in the area. She testified that she spoke to Mr. Dominquez, a broker for the Salas Corporation, who was in the business of negotiating contracts and advising people of fair rents. She described for him a hypothetical commercial building in central Agana and asked his opinion as to a reasonable rental rate. She described a three story, empty shell building, newly constructed in 1972. The building contained approximately 12,000

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appropriateness of 67 cents when the Flores building did not have adequate parking for its own personnel. The Committee, however, passed the GDOL budget, including the rental costs, by a vote of 5 to 2.

<sup>4</sup> This is not the same Duenas building referred to in footnote.

square feet of space and was appraised at \$280,000 for the building and \$66,000 for the land. Water, utilities, and janitorial services were not included. The length of the lease for this building would be five years. After hearing this description, Ms. Lee testified that it was Mr. Dominquez's opinion that 45 cents per square foot was the maximum rent which should be paid for such a building. When Mr. Salas was presented with the same hypothetical, he agree with the 45 cent figure. She concluded that 45 cents per square foot was a reasonable rent largely as a result of this conversation.

On cross examination, Ms. Lee testified that in examining the Comptroller's lease study she also discovered that in 1972 the U.S. Comptroller's Office, located just two blocks from the Joseph Flores Building, was paying a rental value of 69 cents per square foot, although this did include janitorial services and water.

In support of their position that the rental rate was reasonable, GDOL presented the testimony of Mr. Lloyd L. Umagat, former Director of the GDOL. Mr. Umagat worked in various capacities for the GDOL from 1970 to 1978. From 1970 to 1972 he was administrator of the Neighborhood Youth Corps Programs and the Manpower programs. In 1970, the Neighborhood Youth Corps Program was situated on the second floor of the Charlie Corn Building in Agana. The rental per square foot was "around the area between 30 to 40 cents a square foot." They were located there for almost a year. At that time, the various program offices of GDOL were in three different locations.

Mr. Umagat was not involved in the negotiations to lease a new building in 1972 nor in the decision to move into the Flores Building. He recalled, however, that at a staff meeting in 1972, the Director of GDOL showed them rental rates quoted by two building owners prior to the solicitation of formal bids. These buildings, the Pedro Building and the GCIC Building, had adequate facilities which they were renting at 75 to 80 cents per square foot, including utilities and janitorial services. He also testified that there had been a plan for some time to consolidate all the offices of GDOL in one building for better coordination among the programs. The Flores Building was also within walking distance of the Government of Guam Department of Administration, which facilitated their dealings with the Governor's Office and the Department of Administration, such as promulgation of personnel rules and regulations, and the Bureau of the Budget. It was Mr. Umagat's opinion that coordination was definitely enhanced by the location of GDOL next to the administration building. In fact, almost all of the government agencies with which GDOL had daily dealings were located in central Agana. Mr. Umagat testified that at the time of the move into the Flores building in 1972, Employment Services occupied three-fourths of the space on the first floor. He approximated the space needs of GDOL at ,that time to be about 9,000 square feet.

From 1975 to 1976, Mr. Umagat was the Deputy Director of GDOL. In 1977 he accepted the position of Director. Mr. Umagat did participate in preparing the response to the finding of excessive rental costs in the USDOL Audit Report. His participation was limited to a justification of why a central location was needed. He was not involved in determining the actual rental costs.

GDOL also presented the testimony of Mr. Rufo Taitano. From September 1967 to July 1979, Mr. Taitano was chief of real estate for the Guam Housing and Urban Renewal Authority. He left the government from 1970 to 1972 to set up his own real estate company and was qualified as a licensed appraiser. Accordingly, he was familiar with the real estate values in Guam and had been qualified to testify in land matters before both the Guam Superior and District Courts. He was specifically knowledgeable about commercial rental rates in downtown Agana.

Mr. Taitano testified that there were very few commercial buildings suitable for a government office in the immediate area of the Administration Building in 1972, and that, in fact, only half a dozen buildings on the entire island could accommodate the needed 12,000 square feet of space.

When Mr. Taitano opened his real estate company, he rented space in the AFIA insurance building across from the Guam Savings and Loan Association Building for 71 cents per square foot in 1972. The AFIA building was approximately seven years old and had no central air conditioning. Around March of 1973, he rented space in the Pacific Daily News Building for 86 cents per square foot. He testified that he felt that 67 cents per square foot was a reasonable rent to pay for the Flores building in 1972 through 1977, especially since there was no escalation clause in the lease. In addition, the newer Flores building had more amenities than the older AFIA building.

Concerning the rental of 30 cents per square foot paid by GDOL after its move to the Duenas Building in 1977, it was Mr. Taitano's opinion that this rate could have been much higher and was not a result of supply and demand.

### Discussion

The testimony concerning the conditions in the Agana real estate market at the time the Flores Building was rented for 67 cents per square foot by GDOL in 1972 is conflicting. The witnesses presented by both sides testified as to the 1972 rental per square foot of various buildings in the same general area as the Flores building as follows: the Charlie Corn building, 30 -50 cents; the Pedro and GCIC buildings, 75 - 80 cents; the Pete Perez building, 45 cents; the Ada Arcade, 45 cents; the AFIA building, 71 cents; the Comptroller's building, 69 cents. In addition, the rent for the Pacific Daily News building in 1973 was 86 cents per square foot. These rental values would also be affected by the age of the building, the amenities available and the starting date and length of the leases involved. Based purely on these figures the rental cost for the Flores building does not seem unduly high.

There were also other factors, GDOL argues, which would justify the cost of the Flores building in 1972. Both Mr. Umagat and Mr. Taitano testified that there were few buildings available for rental in 1972. In addition, the Flores building was a brand new building with central air conditioning, located close to the Government of Guam Administrative Offices, which allowed the entire GDOL to be housed in the same place.

It is true that the parking facilities at the Flores building were inadequate and that there was no elevator in the three floor building. It was these factors, along with the lower rent available, which resulted in the eventual move to the Duenas building in 1977. But I do not find these drawbacks to be so grave as to require the disallowance of the rent paid on this building in light of the advantages presented by the GDOL. Nor do I attach great weight to the USDOL's reliance on the opinions of Mr. Salas and Mr. -9- Dominquez in reaching their 45 cent figure. Mr. Salas had not been a licensed appraiser since 1966 and at the time of the rental of the Flores building in 1972 was only involved in his real estate practice on a part-time basis, in addition to being a member of the Guam legislature. His personal day to day knowledge of the Agana real estate market is somewhat questionable. Mr. Dominquez did not testify at the hearing and there was no opportunity to examine his qualifications to determine the persuasiveness of his opinion.

Based on the foregoing, I find that although the rent paid for the Flores building may have been in the higher range of rents being paid for space in 1972 and less expensive sites may have been available, the rent paid was not so high as to be unreasonable when compared to the advantages.

In the context of whether GDOL's bid procedure led to a reasonable rent, USDOL argues that, while GDOL did not commit a technical violation of :the required bidding procedure, GDOL's invitation to bid virtually described the Flores building itself, resulting in preselection of the Flores building and possibly precluding the submission of more "reasonable" bids. GDOL argues that it was required to be specific in its bid invitation, that it placed an advertisement in the Pacific Daily News for the purpose of notifying all interested bidders and that any requirements listed by GDOL in its bid were justified by actual need.

While the specificity of GDOL's bid solicitation on its face suggests a certain amount of tailoring, GDOL has presented plausible justification for its requirements, i.e., centralization of GDOL functions and proximity to the Government of Guam Administration building. The bidding requirements were followed properly and no one was prevented from submitting their bid. Upon careful review of the record, I find the evidence presented by USDOL to be insufficient to justify rejecting GDOL's rental expenditures on the Flores building on this basis.



## ORDER

WHEREFORE, I conclude that 67 cents per square foot was, under the circumstances, a reasonable rental for the Flores building space for the 1972-1977 lease and IT IS ORDERED that the sum of \$10,020.87 which is the questioned amount of the ES grant be allowed.

ROBERT G. MAHONY  
Administrative Law Judge

Dated: 11 FEB 1982  
Washington, D.C.

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